

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SASAN MIRKARIMI, individually and on behalf of all others similarly situated, } Case No. 12cv2160-BTM (DHB)
Plaintiff, } **ORDER REGARDING JOINT MOTION FOR DETERMINATION OF DISCOVERY DISPUTE**
v. } [ECF No. 75]
NEVADA PROPERTY 1 LLC, a Delaware limited liability company dba The Cosmopolitan Hotel of Las Vegas; DOES 1-50, inclusive, }
Defendants. }

On October 10, 2014, the parties filed a Joint Motion for Determination of Discovery Dispute. (ECF No. 75.) Plaintiff requests the Court to compel Defendant to produce all documents responsive to Plaintiff's requests for production for which Defendant has agreed to produce documents, and to order Defendant to provide supplemental responses to select interrogatories and requests for production. Having considered the arguments of the parties and the applicable law, and for the reasons set forth herein, the Court **GRANTS** Plaintiff's motion to compel, as set forth below.

I. BACKGROUND

Plaintiff commenced this putative class action on July 12, 2012 by filing a complaint in the San Diego Superior Court alleging that Defendant recorded telephone calls with

1 California consumers without their consent in violation of the California Invasion of Privacy
 2 Act, Cal. Pen. Code § 632, *et seq.* (ECF No. 1.) The action was removed to federal court
 3 on August 31, 2014. (*Id.*) According to the First Amended Complaint, Plaintiff seeks to
 4 certify the following class: “[A]ll natural persons who, while residing in and physically
 5 present in the State of California, and during the applicable statute of limitations: (1)
 6 participated in at least one telephone communication with a live representative of defendants
 7 that was recorded by defendants; (2) were not notified by defendants that their telephone
 8 communication was being recorded; and (3) are identifiable through defendant’s records.”
 9 (ECF No. 8 at ¶ 10.)

10 II. DISCUSSION

11 A. Legal Standards

12 The threshold requirement for discoverability under the Federal Rules of Civil
 13 Procedure is whether the information sought is “relevant to any party’s claim or defense.”
 14 Fed. R. Civ. P. 26(b)(1). In addition, “[f]or good cause, the court may order discovery of any
 15 matter relevant to the subject matter involved in the action. Relevant information need not
 16 be admissible at the trial if the discovery appears reasonably calculated to lead to the
 17 discovery of admissible evidence.” *Id.* The relevance standard is thus commonly recognized
 18 as one that is necessarily broad in scope in order “to encompass any matter that bears on, or
 19 that reasonably could lead to other matter that could bear on, any issue that is or may be in
 20 the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (citing *Hickman*
 21 *v. Taylor*, 329 U.S. 495, 501 (1947)).

22 However broadly defined, relevancy is not without “ultimate and necessary
 23 boundaries.” *Hickman*, 329 U.S. at 507. Accordingly, district courts have broad discretion
 24 to determine relevancy for discovery purposes. *See Hallett v. Morgan*, 296 F.3d 732, 751
 25 (9th Cir. 2002); *Vonole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009)
 26 (“District courts have broad discretion to control the class certification process, and
 27 “[w]hether or not discovery will be permitted . . . lies within the sound discretion of the trial
 28 court.””) (citing *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 209 (9th Cir. 1975)). District

courts also have broad discretion to limit discovery. For example, a court may limit the scope of any discovery method if it determines that “the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(2)(C)(iii).

Generally at the pre-class certification stage, discovery in a putative class action is limited to certification issues such as the number of class members, the existence of common questions, typicality of claims, and the representative’s ability to represent the class. *Oppenheimer Fund*, 437 U.S. at 359. Although discovery on the merits is usually deferred until it is certain that the case will proceed as a class action, the merits/certification distinction is not always clear. Facts that are relevant to the class determination frequently will overlap with those relevant to the merits of the case. *See Wal-Mart Stores Inc. v. Dukes*, --- U.S. ---, 131 S. Ct. 2541, 2551-52 (2011) (explaining that often the “rigorous analysis” under Rule 23(a) “will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.”).

B. Plaintiff’s Motion to Compel

The parties have engaged in a lengthy meet and confer process concerning discovery in this case. Over the past six months, the Court has extended the class certification discovery cutoff four times, and has granted six extensions of time to bring any discovery disputes to the Court. (*See* ECF Nos. 55, 59, 61, 63, 64, 66, 68, 69, 70, 72.) During the meet and confer process, Defendant agreed to produce several categories of documents following an internal investigation to locate and collect responsive data. Plaintiff now moves to compel, on the ground that Defendant’s production is incomplete. Specifically, Plaintiff identifies eight categories of documents of which Defendant agreed to produce documents, but has not yet done so. Plaintiff also moves to compel further responses to Interrogatories Nos. 17 and 25, and Request for Production No. 128. Defendant does not dispute that it has agreed to produce the requested information and documents to Plaintiff. Defendant states that it has been working diligently to collect the information Plaintiff requests, and anticipates completing its production shortly.

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1 **1. Outstanding Document Production**

2 Plaintiff argues Defendant has failed to produce any documents for the following
 3 categories, despite Defendant's agreement to produce them: (1) the recording policies,
 4 procedures, and practices that were in effect during the class period; (2) the telephone lines
 5 used for outbound calls that were recorded during the class period, the names and addresses
 6 of individuals to whom those calls were made, and the identity of the agent who participated
 7 in each call; (3) any instances in which Defendant's agents provided a notice or warning that
 8 a call may be recorded, or in which a caller asked whether the call was being recorded; (4)
 9 call system and recording system data concerning the subject telephone calls; (5) audio
 10 recordings that were made during the class period, the recordings that still exist, the policies,
 11 practices, and procedures for maintaining and preserving the recordings, and identification
 12 of the audio files; (6) the names contact information, and job titles of current or former
 13 personnel in Defendant's Information Technology ("IT") department; (7) information
 14 reflecting spa reservations made by telephone; and (8) the name, address, and telephone
 15 number of California customers in Defendant's loyalty program (the "Identity" program),
 16 together with information about the inbound and outbound calls from or to those individuals
 17 and reservations that were made via telephone during the class period. (ECF No. 75 at 6-7.)
 18 The Court will address each category separately, below.

19 a. **Recording Policies and Procedures (RFP No. 5)**

20 Defendant contends that it has, in fact, produced many documents in response to
 21 Plaintiff's request for policy and procedure documents. (ECF No. 75 at 16-17.) Defendant
 22 states it has produced its "Resort Services Standard Operating Procedures," "Quality
 23 Assurance" documents, and voluminous documents regarding its NICE recording system.
 24 It appears Defendant has complied with this request by producing documents in its
 25 possession and control. To the extent Defendant may have additional documents responsive
 26 to RFP No. 5, the Court directs Defendant to produce the documents to Plaintiff by October
 27 31, 2104.

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1 b. Telephone Lines Used for Outbound Calls (RFP No. 36)

2 Defendant explains that it encountered technical difficulties that have hindered and
3 delayed its ability to produce documents responsive to RFP No. 36. Defendant indicates that
4 its production should be complete by the end of the month. In the meantime, Defendant
5 states that it will produce all call recordings it has in its possession, as well as all NICE
6 system metadata. The NICE system metadata contains a record of all inbound and outbound
7 calls, and includes the customer phone number, agent number and name, and the date, time
8 and duration of each call. The Court directs Defendant to produce all documents responsive
9 to RFP No. 36 by October 31, 2014.

10 c. Notice or Warning of Recording (RFP Nos. 18-20)

11 Defendant does not address this category of documents in its portion of the Joint
12 Motion. The Court finds that if the information responsive to RFP Nos. 18-20 is not
13 included in the production of the call recordings, Defendant must produce any additional
14 responsive documents by October 31, 2014.

15 d. Call System and Recording System Data (RFP No. 35)

16 Again, Defendant does not specifically address this category of documents. However,
17 it appears that Defendant's production of documents regarding the NICE recording system
18 was responsive to this request. However, to the extent Defendant may have additional
19 documents responsive to RFP No. 35, the Court directs Defendant to produce the documents
20 to Plaintiff by October 31, 2104.

21 e. Audio Recordings (RFP Nos. 44, 47, 48, 50, & 122-124)

22 Defendant indicates that it will produce all call recordings from the class period that
23 it has in its possession. Defendant states that it has already produced documents that relate
24 to its policies, practices, and procedures for preserving recordings in the NICE recording
25 system. The Court directs Defendant to produce all outstanding documents responsive to
26 RFP Nos. 44, 47, 48, 50, and 122-124 by October 31, 2014.

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1 f. IT Department Personnel Contact Information (RFP No. 128)

2 Defendant indicates that it will produce the requested information concerning its IT
3 personnel by October 17, 2014. Defendant states it plans to provide Plaintiff with the names,
4 job titles, and hire dates of current IT personnel, and will produce documents reflecting
5 names, job titles, hire and termination dates, and last known contact information for former
6 IT personnel. The Court finds Defendant's proposed response is sufficient. To the extent
7 Defendant has not already done so, Defendant shall produce documents responsive to RFP
8 No. 128 by October 31, 2014.

9 g. Information Reflecting Spa Reservations (RFP Nos. 131-132)

10 Defendant states that it has endeavored to produce all reservation records, including
11 records from its SpaSoft reservation system. So far, Defendant has been able to retrieve and
12 produce information from its room reservation and dining reservation systems. However,
13 Defendant has been unable to access the requested information from its SpaSoft system.
14 Defendant explains that it does not possess a "data dictionary" for its SpaSoft software, and
15 therefore, is presently unable to extract and produce the spa reservations information to
16 Plaintiff. Defendant states it will continue its efforts to retrieve the data, and will
17 immediately provide Plaintiff with the results.

18 Considering the factors under Federal Rule of Civil Procedure 26(b)(2)(C)(iii), the
19 Court finds that the burden on Defendant to extract the spa reservation data outweighs its
20 likely benefit at this stage in the litigation. Accordingly, the Court declines to compel
21 Defendant to produce spa reservations data at this time. Nevertheless, Defendant is
22 encouraged to continue its efforts to extract the data, and if successful, to produce the
23 information to Plaintiff in an expeditious manner.

24 h. Loyalty Program Information (RFP Nos. 133-136)

25 Defendant indicates that it will produce the requested information regarding its loyalty
26 program. Accordingly, Defendant is directed produce documents responsive to RFP Nos.
27 133-136 by October 31, 2014.

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1 **2. Interrogatories Nos. 17 and 25**

2 Plaintiff asks the Court to compel Defendant to produce further responses to
3 Interrogatories Nos. 17 and 25. Interrogatory No. 17 requests that Defendant identify each
4 outbound call made by Defendant during the class period to a California telephone number
5 on a recorded line, including the telephone number dialed, the date, time, and duration of the
6 call, the name, address, and telephone number of each person associated in Defendant's
7 records with each telephone number dialed, and the name and contact information of the
8 agent who handled the call on behalf of Defendant. (ECF No. 75-18 at 6.) Plaintiff argues
9 Defendant's response to Interrogatory No. 17 is deficient because Defendant has not
10 identified outbound calls, but rather only provided documents that identify toll-free numbers
11 that are used for inbound calls. Plaintiff states Defendant also failed to identify which lines
12 were recorded and has not provided the information identifying the persons called or the
13 customer service agents who handled the calls. In response, Defendant indicates that it will
14 provide the NICE system metadata from the class period. Based on Defendant's description
15 of what the metadata includes, the Court finds that production of the NICE system metadata
16 will be sufficient to answer Interrogatory No. 17. However, to the extent the metadata does
17 not distinguish inbound calls from outbound calls, Defendant is directed to specifically
18 identify which calls were outbound. Defendant shall provide a supplemental response to
19 Interrogatory No. 17 by October 31, 2014.

20 Interrogatory No. 25 requests Defendant to list the telephone numbers operated by
21 Defendant during the class period that were used to make outbound calls to California
22 telephone numbers, limited to telephone lines on which Defendant recorded some or all of
23 the calls. (ECF No. 75-19 at 5.) Plaintiff states Defendant's response to this interrogatory
24 is incomplete because Defendant failed to identify which lines were recorded. The Court
25 finds Defendant's response is insufficient. Accordingly, Defendant is directed to provide a
26 supplemental response to Interrogatory No. 25, that specifically identifies the outgoing
27 telephone lines that were recorded during the class period. Defendant shall provide the
28 supplemental response by October 31, 2014.

1 **3. Request for Production No. 128**

2 Finally, Plaintiff moves to compel Defendant to provide a supplemental response to
3 RFP No. 128. As discussed above, Defendant states it will produce the information
4 regarding its IT personnel that is requested in RFP No. 128. Accordingly, the Court directs
5 Plaintiff to provide a supplemental response as agreed by October 31, 2014.

6 **III. CONCLUSION**

7 Based on the foregoing, IT IS HEREBY ORDERED that Plaintiff's motion to compel
8 is **GRANTED**. Defendant shall produce all documents responsive to Plaintiff's outstanding
9 Requests for Production for which Defendant agreed to produce documents, including RFP
10 Nos. 5, 18-20, 35, 36, 44, 47, 48, 50, 122-124, 128, and 133-136, and shall provide
11 supplemental responses to Interrogatories Nos. 17 and 25, and RFP No. 128 on or before
12 **October 31, 2014.**

13 **IT IS SO ORDERED.**

14 DATED: October 22, 2014

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16 DAVID H. BARTICK
United States Magistrate Judge

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